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ABSTRACT

This review of selected creationism/evolution cases illustrates that neutrality toward religion has not been achieved by the current understanding and application of the First Amendment. Nine cases are cited and discussed: (1) "Wright v. Houston Independent School District" (1970); (2) "Williams v. Board of Education of the County of Kanawha" (1975); (4) "Daniel v. Waters" (1975); (5) "Crowley v. Smithsonian Institution" (1978); (6)"Segraves v. State" (1981); (7) "Dale v. Board of Education" (1982); (8) "McLean v. Arkansas" (1982); and (9) "Edwards v. Aguillard." The courts have accepted claims that only evolution has a scientific basis, and therefore other theories of creation cannot be scientific. Recent case law consistently reflects this bias. Appended are 16 references. (SI)

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CREATIONISM/EVOLUTION IN THE PUBLIC SCHOOLS: NATIONAL POLICY AS SHAPED THROUGH SELECTED LEGAL DECISIONS

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CREATIONISM/EVOLUTION IN THE PUBLIC SCHOOLS: NATIONAL POLICY AS SHAPED THROUGH SELECTED LEGAL DECISIONS

The Lemon v. Kurtzman test has consistently favored a rigorous defense of the establishment clause with the "wall of separation" as a critical ingredient, while the "free exercise" clause has had only recent and scant attention.

This brief review of selected creationism/evolution cases will illustrate that neutrality towards religion has certainly not been achieved by our current understanding and application of the First Amendment.

Wright v. Houston Indpendent School District

Rita Wright, et al, brought suit on November 17, 1970, to enjoin the Houston School District and the State Board of Education from teaching the theory of evolution as part of the academic curriculum (1:1208). After plaintiffs' attorneys withdrew from the case, Wright informed the Court of their inability to employ counsel. Judge Seals granted them permission to proceed pro se, i.e., represent themselves.

Plaintiffs argued that the teaching of evolution inhibited their free exercise of religion and constituted an establishment of religion. They claimed that the theory of evolution was

presented without critical analysis and without reference to other theories of origins. The plaintiffs further argued that the theory of evolution is so inimical to the Creation account that its presentation as part of the curriculum should be viewed as a "direct attack upon plaintiffs' religious beliefs by an organ of government" (1:1209). Plaintiffs also argued that the state, by implicit rejection of a central tenet of their religion (creation of man by God), held that religion up to contempt, scorn, and ridicule, thus acting to discourage, if not to restrain their free exercise of religion. Finally, the plaintiffs charged that by restricting the study of human origins to an uncritical examination of evolution, the school was lending official support to a "religion of secularism" under the guise of scientific theory, thus propagating a doctrine fundamentally religious in nature and in violation of the First Amendment's establishment clause and the principle of neutrality affirmed in Epperson (2:97).

The court rejected any similarity to the Epperson Case, because Epperson had challenged a written law, whereas the plaintiffs in this case had challenged no written law, practice, or policy. Using this reasoning, the court granted a motion by the defendants that the plaintiffs failed to state a claim upon which relief could be granted. Judge Seals stated that it would

require obtuse (dull) reasoning to find any merit in the "free exercise" issues in the case. The Judge reaffirmed the Zorach opinion stating that "No religious exercise or instruction is brought to the classroom of the public schools" (3:306).

Judge Seals also criticized the plaintiffs for "attempting to have it both ways". He said, "On the one hand, they argue that they are forced to submit to teachings which deeply offend their religious beliefs and yet they reject the option of leaving the classroom during the presentation of the offending material" (1:1213). One would wonder what prevented Judge Seals from seeing the obvious relationship this argument has with the Schempp Case (4:203). The stigmatizing of young Schempp by having to leave the classroom was a major argument in his favor. Seals also refuted (but without giving a rationale) plaintiffs' claim that their Fourteenth Amendment "equal protection" rights had been violated (1:1214).

The court in this case, while rejecting several popular claims of creationists, did open the door for future argument by stating (in reference to Schempp) that: a) "the First Amendment does not say that in all respects there must be a separation of Church and State," b) "science and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers," and c) "avoidance of any reference to the

subject of human origins is, indeed, a decidedly totalitarian approach to the problem presented here" (1:1210-11).

Finally the court displayed an alarming naivete concerning the operation of schools by suggesting that, "There has been no suggestion that plaintiffs, or any other students, have been denied the opportunity to challenge their teacher's presentation of the Darwinian theory" (1:1210). This statement errs in at least two ways. It could well set a precedent at the Federal District Court level of challenging teacher authority which, as any administrator or teacher knows, occurs enough without judicial reinforcement. The other problem which the judge evidently failed to recognize is that teacher and test effectively dominate the curriculum in most traditional school environments. Students rarely take it upon themselves to initiate running philosophical battles with teachers. Peer pressure from students and potentional grade reductions by teachers are two of the more obvious reasons. Judge Seals' remedy would apparently pit children against adult teachers in battling for their "equal protection" rights--a highly unrealistic scenario.

Williams v. Board of Education of the County of Kanawha

This 1975 case was aimed at evolutionist and non or anti-theistic textbooks. Plaintiffs charged that the textbooks

in question did "impair and undermine their religious beliefs and invade their personal and familial privacy." Further, that their children were entitled to an education of intellectual and moral excellence and therefore were also "entitled to receive instructions and textbooks which are free from religious value inculcation ..." (5:94).

Plaintiff Williams said that the textbooks adopted by the defendants contained both religious and anti-religious material, such as articles encouraging a disbelief in a supreme being, the use of vile language, and encouragement to violate the Ten Commandments and civil law (5:94-5). Plaintiffs argued that the defendant school district, by using such materials, violated a position of neutrality in religious matters as required by the Supreme Court and inhibited the free exercise of their religion as guaranteed by the First Amendment.

In this case, the court weighed the potential censorship of materials more heavily than considerations of inhibiting religious views or establishing a secular religion, i.e., evolution. Judge Hall restated the need for neutrality in such matters as "religious theory, doctrine, and practice," and that Government "may not be hostile to any religion or to the advocacy of no religion," (5:96). The court went on to state, in almost identical terms as in Wright v. Houston that: a) "a complete loosening of imagination is necessary to find that placing of

books and materials in schools constitutes an establishment of religion ..." and that b) the First Amendment "does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught..." This is basically the same conclusion as found in the Wright case--save the double negative.

The court (as in Wright v. Houston) granted a motion by the defendants that the plaintiffs' complaint failed to state a claim upon which relief could be granted. Judge Hall reasserted that the First Amendment mandates neutrality between religion and religion, and between religion and non-religion. Whether one assumes evolution to be non-religion or a secular religion, one is left searching for balance and neutrality. The point could be made that the practice of teaching only the evolution theory apparently fails this test either way.

This case had an interesting follow-up. One of the defendants in the case, Alice Moore, who was School Board President of Kanawha County Schools, was a speaker at the 1981 Association of American Publishers meeting in Washington, D.C. Her message? She argued that to teach only evolution in schools was "one-sided, dogmatic, and indoctrinating," and in advocating a position of true state neutrality, said that "the child who believes in God should have the right to have his or her beliefs protected" (6:39).

Daniel v. Waters

The Daniel v. Waters case (7:485), in 1975, was apparently the first test case for what is referred to as the "equal time" or "balanced treatment" approach to origins education. Tennessee enacted a statute providing that any biology textbook used in the public schools which discussed a theory about the origins of man had to state explicitly that such theory was not scientific fact. The textbooks were to give equal time to certain other theories of man's origin. The Bible, however, was the only writing that was exempted from the above disclaimer about being only a theory. The statute also forbade the teaching of any "occult" or "satanical" beliefs as concerning the origin of man.

The Sixth Circuit Court invalidated the statue because in stating that the Biblical account was to receive "equal time" it would actually get "preferential treatment" since it was exempt from the disclaimer. Again the Court ruled that the "establishment clause" does not permit religion to be preferred over non-religion. The court also found fault with denying occult and satanic beliefs equal treatment, stating such statutes would embroil the state's textbook commission in theological debate. And such debate, according to this decision, "would be an impermissible entanglement between church and state" (8:921-23).

Crowley v. Smithsonian Institution

The 1978 Smithsonian Case (9:725) is included in this study, since plaintiffs, defendants, and the court used the same arguments, case citations, and conclusions as found in our public school cases.

The plaintiffs raised a challenge to existing and proposed exhibitions on the subject of evolution at the National Museum of Natural History of the Smithsonian Institution. Plaintiffs charged that the federally funded Museum presented evolution as the only credible theory of origins, thereby establishing a religion of secular humanism, and violating government neutrality in such matters. Plaintiffs sought an injunction to stop exclusively evolutionist exhibits or that exhibits depicting the Biblical account of creation be funded on an equal basis.

The court granted a summary judgment for the defendants stating that the Smithsonian was operating within the proper scope of its duties to "diffuse knowledge," and educate the public on the "current state of scientific knowledge," and that the exhibits were "wholly secular." The judge used the four-pronged test for First Amendment controversies from the oft-quoted Lemon v. Kurtzman case (9:602):

1. Does the act reflect a secular legislative purpose?
2. Is the primary effect of the act to advance or inhibit religion?

3. Does administration of the act excessively entangle the government with religion?
4. Does implementation of the act inhibit the free exercise of religion?

The court ruled that plaintiffs' case failed all four tests, with the judge adding that, "Even accepting their argument that evolution is hostile to their beliefs as to creation, this impact is at most incidental to the primary effect of presenting a body of scientific knowledge." Judge Parker referred to the Wright v. Houston Case in affirming that, "The Court is convinced that the connection is too tenuous a thread on which to base a First Amendment complaint" (10:727).

Segraves v. State

This 1981 California Superior Court case (11:978) was included because of its overall impact on creation/evolution awareness throughout the country. The case had extensive television coverage that revealed its circus-like atmosphere which included the Judge talking on-the-record to television camera crews.

Plaintiffs' argument was that the California public school curriculum established a religion of secular humanism by teaching evolution as fact, and that the appropriate remedy to attain constitutional neutrality was to include the teaching of

creationism. Despite all the attending hoopla, this case was quickly disposed of when plaintiffs backed off their demands for the teaching of creationism, and merely asked that evolution be treated as a theory rather than as a fact. Such a compromise was easily accomodated by the court as the California State Board of Education had passed a policy memorandum in December of 1972, prescribing just such an approach to the teaching of evolution. Plaintiffs claimed victory, but as Dr. Lines pointed out (12:43), it was a hollow one, since no new constitutional opinions were generated.

Dale v. Board of Education

This 1982 South Dakota Supreme Court case (13:108) received heavy regional media coverage, and brought a largely ignored but significant question to focus: "Can creationism be taught in the public schools?"

In this case, Lloyd Dale, a 17-year veteran teacher and former State N.E.A. President, had his teaching contract nonrenewed. The Lemmon School District stated that because excessive class time was devoted to the conflict between evolution and creation, students were not receiving sufficient instructional time in other basic biological objectives. According to testimony, Dale had been warned several times in the preceding two years and had been given guidelines to follow which

allowed one week for the creationism/evolution conflict to be discussed. The Lemmon School Board alleged that Mr. Dale refused to follow their guidelines. An interesting point in the case was that while the school board was concerned about possible "establishment clause" violations, they did not demand that Mr. Dale desist from the teaching of creationism, but only that such instruction be largely curtailed.

The South Dakota Supreme Court did not touch the issue of the teaching of creationism, but simply reaffirmed the School District's charge of willfully disregarding board guidelines.

McCarthy (14:83) noted that the issue of whether creationism could be taught at all in public schools, and if so, to what extent, remained unclarified by the court.

McLean v. Arkansas

Arkansas had enacted a law in 1982 (ACT 590), similar to one passed in Tennessee requiring a "balanced treatment" for evolution and creationism, i.e., creationism was to receive equal time, material expenditures, and text coverage, along with evolution (15:1255).

The court allowed 31 appellees to argue against equal time for scientific treatment of creationism, but only one to defend the balanced treatment act. Judge Overton ruled that the Attorney General would adequately represent the State's interest

in protecting its legislative enactment. The American Civil Liberties Union (ACLU) played a major role in funding the fight against balanced treatment for creationism, but were not listed among the 31 appellees.

Creationists, having had little success with arguments that evolution is anti-religious (thus inhibiting the free exercise of religion) or that the exclusive teaching of evolution establishes a religion of secular humanism (thus violating the "establishment clause" and constitutional "neutrality") decided on another approach. The argument in this case was that scientific creationism or creation science is science totally independent of religion, and therefore not only acceptable, but mandatory for a balanced and uncensored school curricula.

Judge Overton applied the four-pronged test from Crowley v. Smithsonian. The test, however, lost one of its "prongs" in transit and was now a three-pronged test. Interestingly, the prong that was deleted was the fourth, which was to protect the free exercise of religion.

The plaintiffs argued that creationism was nothing more than religion in disguise, and used much of the defenants' religiously oriented writings against them in an effort to prove impermissible motivation. Judging from the 19-page abstract of the trial, it seems apparent that Judge Overton allowed as

admissable evidence every conceivable quotation the plaintiffs could find showing a religious foundation for creationism (much from writers who were creationists, but selected from works unrelated to creation science). The court, in the opinion of some, revealed its biases against the Balanced Treatment Act in allowing a literal avalanche of testimony against the Act. The court's attitude was also traceable by subjective comments such as the one involving a Ms. Wilson, who was supposed to have developed a creationism teaching plan for schools in the state, but said she could not because creationism materials were too riddled with religious inferences. The court accepted her testimony without question, and tellingly said, "She obviously approached the assignment with an open mind and no preconceived notions about the subject" (15:1270).

Judge Overton declared that the Arkansas Act failed the three-pronged test for secular purpose, advancement of religion, and for excessively entangling the government in religion. For good measure, the act was also declared unconsititutionally vague.

Edwards v. Aguillard

Learning from some tactical mistakes in the Arkansas case, creationists made the Balanced Treatment Act in Louisiana specifically devoid of references to a deity, the Bible, or

anything religious (16-1704). Louisiana Act 685 was brief, general and non-religious. It read as follows:

> Commencing with the 1982-83 school year, public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact (16-706).

The American Civil Liberties Union (ACLU) maintained that Louisiana's Balanced Treatment Act of 1981 was unconstitutional because it was motivated by Christian fundamentalists. Justice Scalia responded that over half of Louisiana's legislators were Catholic, atheist, or of some other religious persuasion. Catholics alone made up 55% of the population of Louisiana.

Scalia noted that since the bill easily passed the State Senate (by a 70% margin) and House (by an 80% margin), it was obviously supported by non-fundamentalists.

Referring to the "Lemon Test," Scalia also pointed out that although the bill's sponsors admitted to secondary religious motivations, the primary purpose was secular--namely, providing a more open and balanced public education. The State argued that while creation meant an abrupt appearance of life on earth, it didn't necessarily imply a belief in a personal God.

The court, however, by a 7-2 margin found Louisiana's Act unconstitutional. Referring to the Lemon standard, the court stated that the act did not have a "clearly secular purpose."

On the issue of whether or not creationism could be taught at all in public schools, the court said that teachers "already possess flexibility to supplant the present science curriculum with the presentation of theories besides evolution about the origin of life."

The following quotes from Justice Scalia's dissenting opinion in Edwards v. Aguillard highlight a fundamental question left for the courts and public schools to contend with in the future: Is creationism "not science at all, but thinly veiled religious doctrine?" or "a collection of educationally valuable scientific data that has been censored from classrooms by an embarrassed scientific establishment?"

It has been taken for granted that the teaching of creationism necessarily has the primary effect of advancing religion, but this argument assumes creationism to be unscientific. If the creationist theory is true, however, how could it be anything less than pure science? Conversely, if evolutionary presumptions are wrong, how could evolution theory be rooted in scientific fact? The courts, to this point, have accepted claims that evolution has the sole scientific basis, and therefore other theories of creation cannot be scientific. Recent case law consistently reflects this bias.

REFERENCE LIST

1. Wright v. Houston Independent School District, 366F. Supp. 1208-14 (1972).
2. Epperson v. Arkansas, 393 U.S. 97 (1968).
3. Zorach v. Clauson, 343 U.S. 306 (1952).
4. Abington School District v. Schempp, 374 U.S. 203 (1963).
5. Williams v. Board of Education of the County of Kanawha, 388F Supp. 93 (1975).
6. Brush, Stephen G. "Creationism/Evolution: The Case Against 'Equal Time'," The Science Teacher, Vol. 48:4, April, 1981.
7. Daniel v. Waters, 515 F. 2nd 485 (6th Cir. 1975).
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9. Lemon v. Kurtzman, 403 U.S. 602 (1971).
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11. Segraves v. State, No. 278, 978 (Cal. Super. Ct. March, 1981).
12. Lines, Patricia. "Scientific Creationism," Loyola Law Review, Vol. 28:1, Winter, 1982.

13. Dale v. Board of Education, Lemmon Independent School District 52-2, S 316 Nw 2nd 108 (1982).

14. McCarthy, Martha M. A Delicate Balance: Church, State, and the Schools. Bloomington, Indiana: Phi Delta Kappan Educational Foundation, 1983.

15. McLean v. Arkansas Board of Education, 529 F. Supp. 1255 (1982).

16. Aguillard v. Treen, 440 So. 2nd 704 (Louisiana Supreme Court, 1983) and Edwards v. Aguillard, 107 S. CT. 2573 (1987).